No. 20121, 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY,

Appellants,

vs.

VAN HARRIS, an individual, doing business as Harris & Sons,

Appellee.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY,

Appellants,

vs.

PARAMOUNT TRUCK RENTAL, INC., and VAN HARRIS, an individual doing business as Harris & Sons,

Appellees.

PARAMOUNT TRUCK RENTAL, INC.,

Appellant,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

Brief of Appellants L. E. Dixon Company and Fidelity and Deposit Company of Maryland.

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Jurisdictional Statement.

This is an appeal from judgments entered in two consolidated cases on March 23, 1965, by the United States

District Court for the Southern District of California, Central Division [C. T. p. 177].

Both plaintiffs based jurisdiction of the District Court on Section 2 of the Miller Act, 49 Stat. 794 (1935), 40 U.S.C. §270b (1952), as amended August 9, 1959, Pub. L. 80-135, §1, 73 Stat. 279 [C. T. pp. 2 and 147]. Appellants L. E. Dixon Company and Fidelity and Deposit Company of Maryland filed a timely notice on appeal [C. T. p. 184] and this Court's jurisdiction accordingly rests upon 28 U.S.C. §1291.

Statement of the Case.

Prior to June 18, 1962, the California Institute of Technology (hereinafter referred to as "Cal Tech") contracted with the United States Government to do certain development work [Pltf. Ex. 1, hereinafter referred to as the "Prime Contract"]. Subsection (b) of Article I of the Prime Contract provides that:

> "The Contractor may, when authorized by Task Orders or Task Order Amendments, enter into subcontracts for the construction of facilities by approved Construction of Facilities Projects."

Article 6 of the Prime Contract, entitled "SUBCONTRACTS", specifies the terms by which Cal Tech could subcontract the construction work necessary to fulfill the obligations of the Prime Contract.

On June 18, 1962, pursuant to a Task Order issued under the Prime Contract, Cal Tech entered into a subcontract with defendant and appellant L. E. Dixon Company (hereinafter referred to as "Dixon"), by the terms of which Dixon agreed to construct the Central Engineering Building at the Jet Propulsion Laboratory in

Pasadena, California [Pltf. Exs. 7 and 8]. Defendant Fidelity and Deposit Company of Maryland (hereinafter referred to as "Fidelity"), as surety, executed a bond pursuant to Section 1 of the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. 270a [Pltf. Ex. 2].

Having taken subcontract bids for portions of the work to be performed by it, Dixon, on or about June 21, 1962, received by mail a written subcontract [Pltf. Ex. 3] executed by cross-defendant Van Harris, an individual doing business as Harris & Sons (hereinafter referred to as "Harris"), accompanied by a letter of transmittal [Pltf. Ex. 5]. By the terms of said subcontract, Harris agreed to perform certain grading and excavation operations in connection with the construction of the Central Engineering Building.

Shortly thereafter, Harris entered into an agreement with use plaintiff Andrew Franklin Yost (hereinafter referred to as "Yost"), whereby Yost agreed to perform all of the physical work which Harris had agreed to perform for Dixon [Pltf. Ex. 4]. Yost then entered into an agreement with use plaintiff Paramount Truck Rental, Inc., (hereinafter referred to as "Paramount"), whereby Paramount agreed to furnish to Yost on a rental basis certain labor and equipment necessary for the excavation and grading at the Central Engineering Building site [R.T., Vol. I, page 54, lines 3-8].

The work was commenced on July 1, 1962, by Yost and Paramount with Harris supervising. On July 20, Harris submitted a bill for $7,213.50 to Dixon to cover the completion of the first third of the work. This first progress payment was paid by Dixon around August 10, 1962 [R.T., Vol. II, p. 227, lines 8-23]. The second progress payment covering the next twenty percent of

the work was never made due to the inability of Harris to provide labor and material releases from Paramount and Yost [Pltf. Ex. 9]. Thereafter, Yost and Paramount ceased all work on the project [R.T., Vol. II, p. 185, lines 16-23; p. 196, lines 9-12], except for some work performed at the request of Dixon. Dixon paid for part of this work, and it is not involved herein [R.T. Vol. I, p. 135, line 25, to p. 136, line 11]. Paramount contends that services of the value of $431.09 were performed by it directly at the request of Dixon and this amount is in dispute herein [R.T., Vol. I, p. 65, line 10, to p. 68, line 3; C.T., p. 173, lines 29-30]. Dixon was required to spend $43,037.70 in order to complete the grading and excavation [R.T., Vol. II, p. 231, lines 12-17].

The present action is a consolidation of separate suits brought by use plaintiffs Yost and Paramount against appellants Dixon and Fidelity. Both plaintiffs sought recovery under the bond executed by Dixon and Fidelity. Cal Tech and the United States are named as joint obligees on that bond and Dixon is named as the principal. In the Paramount action, Dixon filed and served a third party complaint against Harris and Yost, and in the Yost action Dixon filed a cross-complaint against Harris and a counterclaim against Yost. The action brought by Yost was dismissed prior to trial [C. T., p. 141], and hence Yost is not involved in this appeal. The trial court gave judgment for appellee Paramount in its action against appellants Dixon and Fidelity and gave judgment for appellee Harris in the cross actions brought by appellant Dixon [C. T., p. 177]. Appellants Dixon and Fidelity appeal from such judgments [C. T., p. 184].

Statutes Involved.

The Miller Act:

Section 1 [49 Stat. 793 (1935); 40 U.S.C. §270a].

Bonds of Contracters for Public Buildings or Works; Waiver of Bonds Covering Contract Performed in Foreign Country.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum on 40 per centum of the total amount payable by the terms of the contract. Whenever the

total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much on the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2 [49 Stat. 794 (1935); 40 U.S.C. §270b, as amended August 4, 1959, Pub. L. 86-175, §1, 73 Stat. 279]:

Same; Rights of Persons Furnishing Labor or Material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment

bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such

suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

California Civil Code, §1624. *Statute of Frauds.*

The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: . . .

2. A special promise to answer for the debt, default, or miscarriage of another; except in the cases provided for in Section 2794; . . .

Specifications of Error.

(1) The District Court erred in finding that Paramount was a subcontractor of, or joint-venturer with, a subcontractor of Dixon;

(2) The District Court erred in finding that Dixon was the "contractor" within the meaning of the Miller Act;

(3) The District Court erred in finding that Paramount was within the protection on the bond in question;

(4) The District Court erred in finding that there was no valid written contract between Dixon and Harris;

(5) The District Court erred in finding that Dixon prevented performance of such written contract by Harris; and

(6) The District Court erred in finding that Dixon breached such written contract; and

(7) The District Court erred in denying Dixon recovery against Harris.

Summary of Argument.

This action is brought by Paramount to recover against Dixon and its surety (Fidelity) on a bond executed by them under the provisions of the Miller Act. Under the rule announced in *MacEvoy v. United States for the use and Benefit of Calvin Thompkins Company,* 322 U.S. 102, 64 S.C. 890, 88 L. ed. 1163 (1944), only suppliers or subcontractors to the prime contractor or to a subcontractor of the prime contractor may recover on such bonds; *i.e.,* suppliers on the fourth "tier" or below cannot recover. In the instant action Cal Tech contracted to build an engineering building for the United States. Thereafter Dixon contracted with Cal Tech to do the construction work and Harris contracted with Dixon to do the grading and excavation. Harris in turn contracted with Yost, whereby Yost agreed to do all of the grading and excavation. Paramount rented equipment and labor to Yost. Paramount, therefore, was on the fourth "tier" from Dixon and on the fifth "tier" from Cal Tech. On these facts, the District Court held that Dixon was actually the prime contractor and that Harris, by reason of the delegation of all of his duties to Yost, was thus removed from the chain of subcontractors and that Paramount, therefore, was entitled to recover on the bond.

Appellants respectfully submit that such findings are contrary to law, in that Harris was at all times a subcontractor and Dixon was not the general contractor.

Midway through the work, Harris ceased performance of the grading and excavation which he had contracted to perform. As a result, Dixon incurred $43,037.70 in expenses in completing the work. Dixon's action against Harris seeks reimbursement of this amount as well as any amounts Dixon might be required to pay Paramount. The District Court found that there was no written contract between Dixon and Harris, but only an implied contract for value of services rendered. The District Court further found that Dixon prevented Harris' performance of any contract by conditioning progress payments on Harris' providing releases from Yost and Paramount and that Dixon had breached any express contract by improperly engineering the work and by refusing to allow Harris to stockpile reusable dirt on the job site. Appellants respectfully submit that such findings are unsupported by evidence and are contrary to law.

ARGUMENT.

I.

Paramount Is Too Far Removed From the General Contractor to Be Within the Protection of the Miller Act Bond.

Section 1 of the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. §270a, provides for the posting of a payment bond with the United States before any contract exceeding $2,000.00 in amount is awarded for the construction, alteration, or repair of any public building or public work of the United States. Section 2 of the Miller Act, 49 Stat. 794 (1935), 40 U.S.C. §270b, as amended by 73 Stat. 279 (1959), which deals with the rights of persons furnishing labor or materials under such a bond, provides as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under §270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have

> a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

The Supreme Court of the United States, in *Clifford F. MacEvoy Company v. United States for the use and Benefit of Calvin Thompkins Company,* 322 U.S. 102, 64 S.C. 890, 88 L. ed. 1163 (1944), had occasion to determine the scope of protection provided in this section of the Miller Act. In so doing, the Court held that:

> ". . . the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors *who deal directly with the prime contractor* and (2) those materialmen, laborers *and sub-subcontractors* who, lacking express or implied contractual relationship with the prime contractor, *have direct contractual relationship with the subcontractor* and who gave the statutory notice of their claims to the prime contractor." *Id.* at 107-108. (Emphasis added).

Since the decision in *MacEvoy,* the Federal Courts have consistently held that, in order for a materialman, laborer or subcontractor to bring himself with the protection of §270b, he must either be in privity of contract with the prime contractor, thereby making him a subcontractor, or in privity of contract with a subcontractor, thereby making him a sub-subcontractor.

Any materialman, laborer or subcontractor who falls below the third tier, *i.e.,* is not at least a sub-subcontractor, falls outside the protection of the Miller Act. *E. E. Elmer v. United States Fidelity and Guarantee Co.,* 275 F.2d 89 (5 Cir. 1960); *Aetna Insurance Co. v. Southern, Waldrup & Harvick,* 198 F. Supp. 505 (N.D. Cal. 1961); *United States for the use and Benefit of Whitmore Oxygen Co. v. Idaho Crane & Rigging Co.,* 193 F. Supp. 802 (E.D. Idaho 1961); *United States for use and Benefit of Jonathan Handy Co., Inc. v. Deschenes Construction Co., Inc.,* 188 F. Supp. 270 (D.Mass. 1960); *United States for use and Benefit of Newport News Shipbuilding & Dry Dock Co. v. Blount Bros. Construction Co.,* 168 F. Supp. 407 (D. Md. 1959).

Under the rule announced in *MacEvoy,* Paramount, in order to recover under the bond, must show that Dixon was a prime contractor and that Paramount was in privity of contract with either Dixon or a subcontractor of Dixon. In this action, the trial court held that Dixon was the "General Contractor" under the Miller Act [C. T., pp. 164-165, 175-176] and further held that Paramount was not precluded from recovery by reason of the *MacEvoy* rule since Dixon's subcontractor (Harris) had delegated all of the burdens of his contract to Yost, thereby making Yost a subcontractor of Dixon and Paramount a supplier of materials to a subcontractor of Dixon (Yost) and therefore within the protection of the Miller Act [C. T., pp. 162, 165-168; and in particular p. 167, lines 14-22].

The trial court apparently agreed with Paramount's theory that Yost, who supplied all the physical labor, was a subcontractor of Dixon and Harris was only a

"paper subcontractor." The record shows, however, that Harris was a subcontractor with real duties and rights; his subcontract was not simply a paper transaction devised by Dixon to avoid liability. There was no novation; Dixon always looked to Harris for performance and Yost looked to Harris for payment. Further, Harris participated in the performance of the contract [R. T., Vol. I, p. 44, lines 13-17, 23-25]. The weakness of Paramount's theory is that, to the extent that any work on a construction project is subcontracted, the contractor becomes, to that extent, a "paper contractor." According to that theory, an entirely different result would be reached if Harris had retained a small part of the physical work to perform himself. Paramount's theory is an attempt to analogize to the distinction in real property law between a partial assignment of a lease (*i.e.*, a sublease) and a full assignment of a lease. See: *Barkhaus v. Producers' Fruit Company*, 192 Cal. 200, 205-206, 219 Pac. 435, 437 (1923). Under real property law, a sublessee of the entire term of a lease is considered an assignee and has direct rights against the landlord. The explanation for this result is that the parties' interests in the land constitute "estates", which give rise to a "privity" between the sublessee and the landlord. *Barkhaus, supra.* In the instant situation, however, there is no "estate" or "privity" between a sub-subcontractor and the prime contractor of a construction contract and hence the sub-subcontractor has no rights against the prime contractor. *Powers Regulator Company v. Seaboard Company of New York*, 204 Cal. App. 2d 338, 345-346, 22 Cal. Rptr. 373, 377-378 (1962).

The contract between Dixon and Harris imposed certain duties upon Harris and granted him certain

rights. It is technically inaccurate to talk about Harris "assigning" his contract with Dixon since only rights are assignable; duties are delegable. Williston states:

> "DISTINCTION BETWEEN ASSIGNMENT OF RIGHTS AND DELEGATION OF DUTIES. A clear conception of the law governing assignment of contracts can be obtained only by sharply distinguishing between . . . assignments of rights and of duties." [3 Williston, Contracts, §407, (3rd ed. 1961)]
>
> "Section 411. DELEGATION OF DUTIES. The duties under a contract are not assignable *inter vivos* in a true sense under any circumstances; . . . .
>
> "One who is subject to a duty though he cannot escape his obligation may delegate performance of it provided the duty does not require personal performance." [*Id.* §411].

See also: 4 Corbin, Contracts, §§864, 866 (1951); *Gregers v. Peterson Ice Cream Company,* 158 Cal. App. 2d 746, 323 P. 2d 572 (1958). Harris delegated all of his duties under the Dixon-Harris subcontract but there is no evidence in the record that he assigned any of his rights under that subcontract. The trial court found that:

> "Yost was a partial assignee of Harris. An assignment depends upon substance rather than form. [Citation omitted.] Here, Yost was assigned all of Harris' burdens and had an equitable right to part of the payments due Harris from Dixon." [C. T. p. 167, lines 14-19].

Yost was to be paid a lower price by Harris than that paid by Dixon to Harris [Pltf. Exs. 3 and 4], and Yost could not, and did not, seek payment directly from Dixon. (After Harris abandoned the contract, Yost performed some work directly for Dixon. That work has been paid for and is not involved in this case [R. T., Vol. I, p. 135, line 25; p. 136, line 11]. Clearly, no attempt was made to assign Harris' rights under the Dixon-Harris subcontract to Yost. Every subcontract must, by its very nature, be an assignment (or, more accurately, a delegation) of burdens and the Harris-Yost agreement was just such a subcontract delegating all of Harris' duties to Yost. Harris' rights were not assigned. To follow the trial court's reasoning would be to abolish the *MacEvoy* rule altogether, since every subcontract must be an "assignment" or delegation of burdens.

If the Harris-Dixon contract had been "assigned," to Yost, then Yost would have had directed rights against and duties toward Dixon and if Dixon had breached its obligations, then Yost could have sued Dixon but not Harris. However, under the subcontract Yost had no rights against, or duties toward, Dixon and if Dixon breached its contract and hence affected Yost's rights, then Yost's only remedy would be against Harris, and not Dixon. *Powers Regulator Company, supra.*

The fact that Yost performed all the physical labor under the Harris-Dixon subcontract did not place him in privity of contract with Dixon since a subcontractor is one who does *part or all* of the work of the contractor. This definition has been affirmed by a number of authorities:

> "Literally, a 'subcontractor' is one who agrees with another to perform *a part or all* of the obliga-

tions which the second party owes by contract to a third party." (Emphasis added.) (*Hihn-Hammond Lumber Co. v. Elsom,* 171 Cal. 570, 154 Pac. 12, 14 (1915).)

"A subcontractor is one who contracts with a principal contractor to perform *all or part* of the work or services which the principal contractor has already contracted to perform." (Emphasis added.) (*Arcweld Mfg. Co. v. Burney,* 12 Wash. 2d 212, 121 P. 2d 350, 353 (1942).)

"A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted with another to perform. In other words, subcontracting is merely 'farming out' to others *all or part* of work contracted to be performed by the original contractor." (Emphasis added.) (*Brygiduir v. Rieman*, 107 Atl. 2d 59, 60 (N. J. 1954).)

"A subcontractor may be briefly described as one who has entered into a contract, express or implied, for the performance of an act, with a person who has already contracted for its performance. . . ." (*Staley v. New,* 250 P.2d 893, 895 (N. M. 1952).)

"SUBCONTRACT. A contract by one who has contracted for the performance of labor or service with a third party for the *whole or part performance* of that labor or service." (Emphasis added.) *Cyclopedic Law Dictionary* (3rd Ed. 1940).

"The term 'subcontract' therefore is not inappropriate to designate one who has contracted with the principal contractor to perform the whole as well as a part of the service which the latter

has undertaken to perform." (*Smith v. Wilcox,* 44 Ore. 323, 74 Pac. 708 (1903), subsequent opinion at 44 Ore. 323, 75 Pac. 710 (1904).)

A number of federal statutes have employed a similar definition. Thus, 60 Stat. 38 (1946), 41 U.S.C. §52, defines a subcontractor as:

". . .[A]ny person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform *all or any part* of the work or to make or to furnish any article or service required for the performance of a cost-plus-a-fixed-fee or cost reimbursable contract or of a subcontract entered into thereunder. . . ." (Emphasis added.)

See also: 56 Stat. 245 (1942); 50 U.S.C. App. §1191 (5)A; 65 Stat. 8 (1951); 50 U.S.C. App. §1213(g). From the foregoing cases and commentaries, it is apparent that a contract to perform all the work for which another has contracted to perform is a subcontract, and not an assignment. The distinguishing features are that in an assignment the assignee receives *all* of the *rights* of the assignor and can enforce them directly against the obligor, while in a subcontract the subcontractor undertakes *duties* from the contractor; the subcontractor has rights against his contractor, but not against his contractor's contractor. The subcontractor's rights against the contractor generally, although not necessarily, are different from those of the contractor against the obligor. If a principal obligor breaches his duty, an assignee has direct rights against him, while a subcontractor whould have no rights against the owner but would have rights against the contractor. This distinction is illustrated in *Arcweld Mfg. Co. v. Burney,* 12 Wash. 2d 212, 121 P.

2d 350 (1942). Burney contracted to perform some alterations and repairs on a home owned by the Home Owners' Loan Corporation (HOLC). Burney then contracted with Schonbein for the latter to do all the work. The court held that:

> "Burney's relation to HOLC with reference to the contract, however, was not changed by the subletting agreement; he still remained obligated to HOLC for the performance of the contract, and, likewise, was still entitled to look to HOLC for the compensation due thereunder. On the other hand, appellant did not, by his agreement with Burney, supplant the latter in his relation to HOLC, nor did he create any legal relation between himself and HOLC so far as the original contract was concerned. However great a personal interest appellant may have had in performing the work under the subletting agreement, he had no lgeal interest in Burney's contract with HOLC. Appellant's relation to Burney and HOLC comes squarely within the definition of 'subcontractor' just given. Burney was the principal contractor, having agreed to perform certain work; HOLC was the party with which that contract had been made and which, accordingly, was entitled to retain its relation with Burney; and appellant was a party contracting with the principal contractor to perform the work which the latter had previously contracted with another to perform. If Burney and appellant had intended to effect an *assignment* of the original contract, it would have been a simple matter, as well as the natural thing, to do so by the use of plain, unambiguous language." (121 P.2d at p. 354.)

It should be noted that in *Arcweld* the prime contractor, Burney, assigned his rights to the funds from HOLC to Schonbein, a factor not presented in the instant case. The situation in this action also involves a subcontract (actually a sub-subcontract) since Yost did not, and could not, look to Dixon for payment [R. T., Vol. I, p. 44, lines 13-19]. The District Court's holding that a delegation of burdens avoids the *MacEvoy* rule has the effect of abolishing that rule altogether since every subcontract must be an "assignment" of burdens.

The District Court also mentioned the possibility that Yost and Paramount were "joint venturers" [C. T., p. 167, lines 19-22]. It is respectfully submitted that there is no indication anywhere in the record that such a joint venture agreement existed. At the trial herein, Robert Dick, general manager of Paramount, testified that Paramount and Yost did not enter into a joint venture agreement [R. T., Vol. I, p. 52, lines 7-10]; that Yost and Paramount did not share profits [R. T., Vol. I, p. 52, line 23, to p. 53, line 3]; and that Paramount was to be paid on a rental basis [R. T., Vol. I, p. 54, lines 3-8]. This testimony was corroborated by Yost [R. T., Vol. I, p. 105, line 18, to p. 106, line 5]. Clearly there was no joint venture agreement between Paramount and Yost since such an agreement requires a community of interest in the enterprise, a sharing of profits and losses, and a joint participation in the conduct of the business. *Adams Mfg. and Eng. Co. v. Coast Centerless Grinding Co.*, 184 Cal. App. 2d 649, 7 Cal. Rptr. 761 (1960); *Hayward's v. Nelson*, 143 Cal. App. 2d 807, 299 P.2d 1013 (1956); *McCullough v. Krammerer Corp.*, 166 F.2d 759, 763 (9th

Cir. 1948), *cert. den.* 335 U.S. 813; 28 Cal. Jur. 2d *Joint Adventurers* §3 (1956).

Paramount and Yost may have cooperated closely in their performances, but this must necessarily occur when two parties work on the same project; such cooperation does not imply a joint venture agreement of the type that would allow Paramount to recover in Yost's place.

II.

Dixon Was Not the "Contractor" Within the Meaning of the Miller Act.

Cal Tech is the Prime Contractor on the Central Engineering Building Project. It alone was in privity with and under contractual duty to the United States, the owner of the land and the new facility. A contractual duty to construct the Central Engineering Building arose out of a Contract between Cal Tech and the United States [Pltf. Ex. 1]. In accordance with Article 6 of the Prime Contract, Cal Tech subcontracted the work to be done to Dixon. The preamble to the contract between Cal Tech and Dixon [Pltf. Ex. 7] expressly states that it is a subcontract under the Prime Contract between Cal Tech and the United States.

The fact that Dixon, under subcontract with Cal Tech, undertook to perform all of the physical work required to be performed by Cal Tech under the Prime Contract does not alter the fact that Dixon is a subcontractor rather than a prime contractor. Although the Miller Act itself does not define the term "subcontractor," it has been defined generally as including one who contracts with another to perform *a part or all* of the obligation which the second party owes by con-

tract to a third party. See the discussion on pages 11-12, *supra,* and the authorities cited therein. The approach taken in those authorities has been adopted in a number of cases. In *Smith v. Wilcox*, 44 Or. 323, 74 Pac. 708 (1903), subsequent opinion at 44 Or. 323, 75 Pac. 710 (1904), the G. H. Dammeir Company sold land to the defendant and at the same time contracted to erect a house on the land. The Dammeir Company then contracted with the plaintiff for the latter to do all the construction work. The court held the plaintiff was a subcontractor rather than a prime contractor since:

> " 'A subcontractor is one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance.' Phillips, Mech. Liens (3d. Ed.) §44. A subcontract is defined to be 'a contract by one who has contracted for the performance of labor services with a third person for the whole or part performance of the labor or service.' Bouvier, Law Dict. The term 'subcontractor' therefore is not inappropriate to designate one who has contracted with the principal contractor to perform the whole as well as a part of the service which the latter has undertaken to perform." (*Id.* at 709.)

See also, *Arcweld Mfg. Co. v. Burney,* 12 Wash.2d 212, 121 P.2d 350 (1942).

Thus, as a matter of law and fact, there can be no doubt that Cal Tech is the Prime Contractor in this project, and that Dixon is a subcontractor. Under the *MacEvoy* Rule, *supra,* only a materialman, laborer, or subcontractor who is in privity of contract with Dixon

can make a claim under the Miller Act Bond involved in this action, and Harris alone is in privity with Dixon. One case has made an exception to this general rule by holding that a "supervisory agent" of the government is not to be considered the "contractor" under the Miller Act. *United States for the Use of West Pacific Sales Co., Inc. v. Harder Industrial Contractors, Inc.,* 225 F. Supp. 699 (D.Ore. 1963). No evidence was introduced in the present action to show that Cal Tech was such a supervisory agent and hence a finding that Dixon was the "Contractor" under the Miller Act is erroneous.

Part III, Division 2, page 24 of the Specifications of the project [Pltf. Ex. 8] do refer to Cal Tech as the agent of the United States, but this is only in reference to the purchase of equipment and hence not in point. The fact that the specifications identify Cal Tech as the agent of the United States for that particular purpose is evidence that Cal Tech is not such an agent for other purposes.

III.

Proof of a Promise by Dixon to Indemnify Paramount for the Cost of Materials and Labor Which Yost Would Not Pay for Is Barred by the California Statute of Frauds.

Paramount produced testimony, over objection, to the effect that it had supplied $431.09 worth of material and labor to the construction project in reliance on an alleged promise by Dixon to pay for that labor and material if Yost failed to pay for it [R. T., Vol. I, p. 65, line 10, to p. 69, line 1; C. T., p. 167, line 32, to p. 168, line 3]. Statute of frauds. California Civil

Code, Section 1624(2); *Clay v. Walton*, 9 Cal. 328 (1858); 23 Cal. Jur. 2d, *Frauds, Statute of*, §89 (1955). In *Clay, supra,* the defendant orally promised a material supplier that he would be responsible for any material sold thereafter to a contractor who was building a house for the defendant. The court held that this promise was unenforcible since within the Statute of frauds. Since the instant case is identical with *Clay*, the District Court's finding that Paramount was entitled to recover said sum from Dixon [C. T., p. 167, line 128, p. 168, line 3] is erroneous.

IV.

The District Court Erred in Holding That There Was No Written Contract Between Harris and Dixon.

On or about June 21, 1962, Dixon received by mail a written Subcontract [Pltf. Ex. 3] accompanied by a letter of transmittal [Pltf. Ex. 5]. Both the letter and the subcontract were signed by Harris. The letter expressed a desire to use a subcontractor and to perform the work in two "move-ins." The Subcontract required written approval by Dixon of all subcontractors and required Harris to prosecute the work with diligence [Pltf. Ex. 3, paras. 21 and 6]. The District Court held that the terms of the letter and the subcontract conflicted; that there had been no meeting of the minds between Harris and Dixon; that Dixon had never accepted the counteroffer contained in Harris' letter; and, hence, that there was no valid written contract between Harris and Dixon [C. T., p. 169, line 12, to p. 171, line 2]. It is respectfully submitted that the above findings are not supported by evidence and are contrary to law.

The evidence shows that Harris commenced performance near the beginning of July. Sometime later, Dixon's job superintendent was told that Yost was a subcontractor of Harris [C. T. p. 170, lines 5-9]. Dixon's only objection to this subcontract was made in September [R. T., Vol. I, p. 78, line 3, to p. 80, line 22]. Clearly performance by Dixon for over a month with knowledge of the Harris-Yost subcontract was acceptance of that subcontract. *Beatty v. Oakland Sheetmetal Supply Co.,* 111 Cal. App. 2d 53, 244 P.2d 25, 30 (1952); *cf. Trubowitch v. Riverbank Canning Co.,* 30 Cal. 2d 335, 182 P.2d 182 (1947).

The work to be performed by Harris involved the excavation of a foundation and basement area and the placing of dirt between the foundation walls and the surrounding earth ("backfilling"). The pouring of the concrete foundation was to be done by another subcontractor. The most economical method of performing Harris' work would be in two move-ins of men and equipment: one to excavate the earth and one to do the backfilling. The provision in the Dixon-Harris Subcontract requiring Harris to perform the work diligently [Pltf. Ex. 3, para. 6] did not require Harris to keep men and equipment standing idle while the concrete was being poured, and hence there is no conflict between the written subcontract and Harris' letter on the subject of the number of move-ins. Furthermore, the evidence at the trial is that the work was performed in two move-ins [R. T., Vol. II, p. 191, line 18, to p. 194, line 10; p. 327, lines 17-21].

The District Court found that after Harris had abandoned the work, Dixon used a number of different contractors at different times and hence the work could

not have been performed in two move-ins [C. T., p. 170, lines 17-24]. This finding is erroneous since, for a number of reasons, it has no bearing on what Harris agreed to and was able to do. In the first place, Dixon was not required to complete performance of Harris' work in accordance with the terms of the subcontract (although any deviation may or may not affect the damages recoverable). In the second place, the number of move-ins actually made had little bearing on how many move-ins could have been made. In the third place, whether it was possible to perform the work in two move-ins is irrelevant to the issue of whether Harris and Dixon contracted to perform it in two move-ins.

The evidence, therefore, is that Harris returned the subcontract accompanied with (perhaps) a counteroffer requesting permission to use a subcontractor and to perform the work in two move-ins. Thereafter, the parties commenced to perform according to the terms of the subcontract. Payments were made by Dixon to Harris in accordance with the subcontract. Dixon knew Harris was using a subcontractor without authorization but did not complain for well over a month. This complaint was never insisted upon. The work was performed in two move-ins. On this evidence the court found that there had not been a "meeting of the minds." It is respectfully submitted that Dixon's actions in proceeding to perform after receipt of the "counteroffer" was an acceptance of that counteroffer. See: *Beatty v. Oakland Sheetmetal Supply Company,* 111 Cal. App. 2d 53, 244 P.2d 25, 30 (1952); *Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co.,* 161 Cal. 466, 473, 119 Pac. 646, 648 (1911). Any insistence by Dixon that Harris could not use a subcon-

tractor would have been a breach of the contract and would not have had the effect of retroactively annulling a contract accepted by a course of conduct extending well over a month. Thus, the parties' minds did meet and an express contract existed between Dixon and Harris.

V.

The District Court Erred in Finding That Dixon Prevented Performance by Harris by Insisting Upon Labor and Material Releases.

The District Court found that Dixon prevented Harris from performing any contract between them by refusing to make progress payments to Harris unless Harris provided releases from Yost and Paramount [C. T., p. 171, lines 3-15]. If, as the District Court found, there was only an implied contract between Harris and Dixon, then Harris was not entitled to progress payments as provided in the writing and Dixon did not prevent Harris' performance in any manner. *Smoll v. Webb*, 55 Cal. App. 2d 456, 130 P.2d 773 (1942). The District Court also notes that if the written subcontract controlled, then Dixon had no right to demand releases as a condition precedent to the progress payment [C. T., p. 171, lines 15-28]. This is clearly erroneous since paragraph 3 of the subcontract between Harris and Dixon [Pltf. Ex. 3] incorporates by reference the terms of the plans and specifications of the General Contract, as the District Court found [C. T., p. 165, lines 15-18]. Paragraph 10 of the GENERAL CONDITIONS of the Specifications [Pltf. Ex. 8] allows retention of progress payments until releases from all materialmen and subcontractors are provided. In addition, the paragraph of the sub-

contract [Pltf. Ex. 3] entitled "Payment Schedule" provides that the subcontractor shall be paid "in accordance with the terms provided for in the General Contract provided for the payment of progress payments to the General Contractor. . . ." These provisions incorporate by reference the provision for releases of the General Contract into the subcontract.

> It is the well settled rule in California that:
>
> "One written agreement may, by express reference, incorporate other written agreements; in such a case the agreement making reference and those referred to must be construed as one contract." (12 Cal.Jur.2d *Contracts,* §123 (1953)).

This rule has often been applied in situations where a subcontractor expressly incorporates by reference the prime contract.

In *Gray v. Cotton,* 166 Cal. 130, 134 Pac. 1145 (1913), a subcontract provided that the plaintiff would perform certain work "in accordance with the plans and specifications as prepared by city engineer." The specifications provided that payment was to be made upon the city engineer's estimate of the amount of work performed. Plaintiff-subcontractor contended that the reference in the subcontract to the specifications related only to the performance of the work and not to the method of payment. The court held, however, that the method of payment was covered by the specifications and so was incorporated into the subcontract. This principle was reiterated and applied in *Holbrook*

v. Fazio, 84 Cal. App. 2d 700, 191 P.2d 123 (1948), where the court held that:

> "The issue on this appeal is whether when a general contract is incorporated into a subcontract by reference the terms of the general contract relating to method and time of payment become a part of the subcontract.
>
> "The answer is in the affirmative."

See also, *Trottier v. M. H. Golden Construction Company,* 105 Cal. App. 2d 511, 233 P.2d 675 (1951).

The written subcontract between Dixon and Harris [Pltf. Ex. 3] presents the same problem as in *Holbrook, supra,* and should receive the same answer. The paragraph entitled PAYMENT SCHEDULE states that:

> "The Contractor agrees to pay the Subcontractor progress payments monthly in accordance with the terms provided for in the General Contract for the payment of progress payments to the General Contractor. . . ."

Additionally, the written subcontract provides in paragraph 3 that:

> "The Subcontractor agrees that said General Contract, together with said plans, drawings, specifications, and addenda, are incorporated in the Subcontract by reference with the same force and effect as if the same was set forth herein at length, and that he will be and is bound by any and all parts of said General Contract, plans, drawings, specifi-

> cations, and addenda in so far as they relate in any part or way, directly or indirectly, to the work herein undertaken or to the material furnished hereunder."

These two clauses of the subcontract show a clear intent that all the terms of the contract between Dixon and Cal Tech should be incorporated by reference into the written contract between Dixon and Harris. More specifically, there was an intent to incorporate the method of payment used in the specifications of the prime contract into the subcontract. Paragraph 10 of the GENERAL CONDITIONS of the Specifications [Pltf. Ex. 8] entitled LIENS was intended by the parties to apply to payments made by Dixon to Harris. This conclusion is supported by the common practice among contractors to require releases from materialmen and suppliers for materials supplied prior to a given progress payment before making a progress payment to the subcontractor. Since the subcontract specifically incorporates all the terms of the general contract, the provision regarding liens in the Specifications applies to prevent recovery by Harris against Dixon until the releases required by the Specifications are provided. Thus, regardless of whether Harris had an express or implied contract with Dixon, Dixon did not prevent Harris' performance by conditioning payment on releases.

VI.

The District Court Erred in Finding That Dixon Breached the Written Subcontract.

The District Court found that Dixon breached the written subcontract with Harris by (a) refusing to allow stockpiling of reusable excavated material within the job site and (b) failing to provide adequate engineering [C. T. p. 171, line 29, to p. 172, line 8]. These findings are unsupported by evidence. The plans provide that:

> "All suitable material shall be deposited on JPL property as selected by the architect. The deposit area must be cleared of all brush and debris. The excess suitable material must be compacted to 90 AASHO. The unsuitable material must be hauled off JPL property at contractor's expense." [Deft. Ex. GG, p. C2, Note 7].

Harris did testify that he wasn't permitted to dump unsuitable earth on the job site [R. T., Vol. III, p. 323, line 18, to p. 324, line 11] but there was no evidence that earth usable for backfilling was not permitted by Dixon to be stockpiled. The uncontradicted testimony of Dixon's superintendent indicates that material suitable for backfill was stockpiled on the job site [R. T., Vol. II, p. 178, line 7, to p. 179, line 1]; that Harris dumped unsuitable material on the job site [R. T., Vol. II, p. 215, line 4, to p. 216, line 11]; and that an area for stockpiling earth was provided Harris [R. T., Vol. II, p. 289, lines 12-15].

The only evidence as to the engineering concerns the placing of stakes in the ground to control the slope of the embankment. The only evidence on this point is

Harris' testimony that he did not know whether or not certain stakes were properly set and that the cut was not made according to the wishes of Dixon [R. T., Vol. III, p. 320, lines 15-22; p. 334, lines 8-19]; and hence a finding that Dixon improperly engineered the work is unsupported by evidence.

The District Court also noted that Dixon requested that Harris perform certain work not required by the written subcontract [C. T., p. 172, lines 19-21]. There is no evidence in the record that such request was ever complied with or that Harris was prejudiced in any way thereby, and hence such a finding is irrelevant to this action.

For the above reasons, the District Court erred in finding that Dixon breached the written subcontract.

Conclusion.

Forthe reasons stated above, it is respectfully requested that the judgment for Paramount Truck Rental, Inc. and Van Harris be reversed and remanded with instructions to enter judgment for appellants L. E. Dixon Company and Fidelity and Deposit Company of Maryland.

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Certificate.

I Certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANDREW J. NOCAS.

TABLE OF EXHIBITS.

Plaintiff Paramount's Exhibits.

Defendant Dixon's Exhibits.

No.		Iden.	Recd.
D	Letters from Dixon to Harris dated between July 16 and November 21	127,161	132,165
D-1	Some of letters from Exhibit D	165	
H	Telegram from Harris to Dixon dated 11-6-62	161	246
I	Summary sheets showing Dixon's weekly costs for backfilling: $6,748.79	161	201
J	Dixon's bill from Acme Rental for vibratory roller and trailer	161	204
K,L,M	Dixon's billings and payments for rental of bare equipment	161	215
N,O,P	Dixon's invoices, statements and checks	161	212
Q,R,S	Dixon's invoices, statements and checks	161	212
T	Dixon's invoices, statements and checks	161	212
U	Dump fees paid by Dixon for disposal of unsuitable material offsite	161	217
V,X,Y	Dixon's invoices, statements and checks	161	212
Z,AA	Dixon's invoices, statements and checks	161	212
BB,CC	Bills and checks for cement and asphalt emulsion to protect north bank of excavation	161	218
DD	Cost of concrete backfilling on north bank	161	223
EE	Cost of fill sand and crusher run material for backfill	161	223
FF	Bill from Harris for first progress payment	225	
GG	Plans for Project	147	164

Third Party Defendant Harris' Exhibits.

BA	Letter of August 7, 1962, from Harris to Dixon	257	259
BC	Letter from Harris	272	
BD	Letter from Dixon re stockpiling	285	286